MOTION FILED

JUN 1 - 2009

No. 08-1375

In The Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

GARY BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion for Leave to File an *Amicus Curiae* Brief Supporting Petitioners

Amicus Curiae Brief of MI Self-Insurers Assoc Supporting Petitioners

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SUPPORTING PETITIONERS

The Michigan Self-Insurers' Association asks the Court for leave to file an *amicus curiae* brief supporting the petitioners.

Counsel of record for the petitioners and respondents have received notice that the Association intends to file an *amicus curiae* brief supporting the petitioners on (Tuesday) May 26, 2009, which was more than ten days before the last day for filing the *amicus curiae* brief, (Monday) June 8, 2009.

Counsel of record for the petitioners consented to the filing of an *amicus curiae* brief by the Association. Counsel of record for the respondents withheld consent.

The Association is interested because all of its two hundred (plus) members are either a Michigan employer or a defined group of Michigan employers that has been approved by the director of the Michigan Workers' Compensation Agency to provide itself with insurance for Michigan workers' compensation under a Michigan statute, MICH. COMP. LAWS § 418.611(1)(a), just as petitioner Cassens Transport. All administer the insurance for Michigan workers' compensation by exercising the right to choose a doctor to examine an employee who claims benefits that a Michigan statute describes, MICH. COMP. LAWS § 418.385, just as petitioner Cassens Transport. The exegesis by the Court of Appeals that this is not insurance within the federal statute, McCarran-Ferguson Act, 15 U.S.C. § 1012(b), negatives these two Michigan statutes.

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INTEREST OF THE *AMICUS CURIAE*

All of the two hundred (plus) members of the Michigan Self-Insurers' Association have been approved to self-insure the liability for workers' compensation by the director of the Michigan Workers' Compensation Agency under MICH. COMP. LAWS § 418.611(1)(a) and administer claims by selecting a doctor to examine claimants under MICH. COMP. LAWS § 418.385 just as petitioner Cassens Transport.[1]

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[1] No counsel for a party authored any part of this *amicus curiae* brief.

No one other than *amicus curiae* MI Self-Insurers' Assoc made a monetary contribution to this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

The Michigan Court of Appeals has authoritatively ruled that there is insurance when the director of the Michigan Workers' Compensation Agency approves an employer to self-insure the liability for workers' compensation under MICH. COMP. LAWS § 418.611(1)(a).

ARGUMENT

I. THERE IS INSURANCE WHEN THE DIRECTOR OF THE MICHIGAN WORKERS' COMPENSATION AGENCY APPROVES AN EMPLOYER TO SELF-INSURE ITS LIABILITY FOR WORKERS' COMPENSATION.

The director of the Michigan Workers' Compensation Agency can approve an employer to self-insure the liability for workers' compensation. MICH. COMP. LAWS § 418.611(1)(a). ("Each employer under this act, subject to the approval of the director [of the Michigan Workers' Compensation Agency] shall secure the payment of compensation under this act by either of the following methods: (a) By receiving authorization from the director to be a self-insurer.") The Michigan Court of Appeals has established that this is insurance. *Heinz v. Chicago Rd Investment Co*, 549 N.W.2d 47, 54 (1996). (". . . self-insurance in the worker's compensation arena is the functional equivalent of purchasing a commercial insurance policy.") This was nothing new. *Id*. ("This Court has previously refused to distinguish between self-insurance and purchasing insurance from a worker's compensation insurer, and we refrain from doing so

now. See *Wallace v Consolidated Freightways*, 199 Mich App 141, 145; 500 NW2d 752 (1993).")

The decision by the Michigan Court of Appeals has the same authority as a decision by the Michigan Supreme Court because it is binding precedent under the rule of stare decisis having been published. MICH. COURT RULE 7.215(C)(2). ("A published opinion of the [Michigan] Court of Appeals has precedential effect under the rule of stare decisis.") Just as a ruling by the Michigan Supreme Court, the ruling by the Michigan Court of Appeals is binding authority until overruled by the Michigan Supreme Court. *Id.* ("The filing of an application for leave to appeal to the [Michigan] Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the [Michigan Court of Appeals].") *Heinz*, *supra*, has not been overruled or even questioned. It has been followed. *Rodriguez v. ASE Ind., Inc.*, 738 N.W.2d 238 (2007).

The decision by the Court of Appeals that there is no insurance when the director approves an employer to self-insure the liability for workers' compensation under MICH. COMP. LAWS § 418.611(1)(a) is in direct and irreconcilable conflict with *Heinz*. Employers and administrators in Michigan such as the director of the Michigan Workers' Compensation Agency and the commissioner of Insurance alike will have to guess whether a Michigan employer who has been duly approved to self-insure its liability for compensation does or does not actually have insurance.

The confusion will be widespread. There are about 600 employers who have been approved by the director to self-insure the liability for compensation.

And these account for nearly half of all compensation benefits that are paid to Michigan employees because the self-insurers include some of the largest employers in Michigan such as General Motors, Chrysler, Ford Motor, AT&T, DTE Energy, and Consumers Energy and nearly all counties and public universities such as the University of Michigan. Institute for Continuing Legal Education, *Michigan Insurance Law and Practice* (2009 Supp), § 13.23, 13-15.

The confusion may end self-insurance for workers' compensation in Michigan. No employer can sensibly continue to self-insure under MICH. COMP. LAWS § 418.611(1)(a) when that may not be insurance under McCarran-Ferguson, 15 U.S.C. § 1012(b) to preclude an employee suing under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* but just buying compensation insurance from an insurance company decidedly fulfills both. Buying a policy of insurance fulfills the state law, MICH. COMP. LAWS § 418.611(1)(b) ("Each employer under this act, subject to the approval of the director, shall secure the payment of compensation by either of the following methods: (b) By insuring against liability with an insurer authorized to transact the business of worker's compensation insurance [in Michigan]") and also the federal law, 15 U.S.C. § 1012(b), to bar a lawsuit under RICO. The increased cost to buy compensation insurance pales before the cost of defending a lawsuit under RICO and leaves self-insurance estranged from Michigan compensation law.

CONCLUSION

The portion for a writ of certiorari should be granted.

Respectfully submitted,

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